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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1884 70-338

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

vs.

CHAS. PFIZER & CO., INC., et al., STATE OF WEST VIRGINIA, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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Prefatory Statement

The failure of all respondents to answer the points in Petitioners' Petition results from an inability or unwillingness to address themselves to the applicable law. Petitioners respectfully urge that, as respondents must know, this settlement cannot withstand any careful scrutiny. The glib assertion often repeated that because this case is labeled a "settlement" the body of law applicable to litigated cases is distinguishable (Def. Br. 8) does not begin to address itself to the contention that the District Court failed to even discuss the law of consumer recovery and the likelihood of success of CCS plaintiffs and consumers.

Respondents submit the issue for review to be solely that of abuse of discretion, and then define that discre-

tion to involve principles unique to settlements, Whereupon, respondents deem themselves excused from discussing in any intelligible detail the legality of notice to consumers and to the wholesaler-retailer class, the absence of the opportunity to be heard on the consumer notice, any of the details of the CCS negotiations and agreement predetermining the allocations without so informing other classes—and thus misleading petitioners' class, the entire concept of law created by the Second Circuit of "assignment by silence," the misuse of "pass-on," the contradiction between a court in a settlement not determining issues of law and fact and then *finding* a fact against one class without an adequate record and any real hearing, and by ignoring significant evidence in conflict with and contrary to that finding.

All of the basic violations of law portrayed herein, singly and collectively constitute an abuse of discretion by any court condoning the procedures and devices employed to accomplish defendants' dismissal. Defendants are not *giving* away money to states, etc. for consumers; they have deposited an unallocated sum for court distribution. Defendants, CCS plaintiffs and the committee of counsel should not be permitted to dictate a result contrary to all law in any class action case involving the rights of millions of purchasers, be they retailers, wholesalers, consumers or states.

The responses of several respondents contain new matters not directly addressed in the Petition, discuss the merits of the lower court judgments as the sole basis for review, and contain many contradictions and misrepresentations constituting an imposition on the Court, all of which require this reply—going to some extent into the merits, for which petitioners respectfully, but earnestly request this Court's indulgence.

I.

The Failure of Respondents to Address Themselves to the Global Nature of the Multiclass Competition Over the Settlement Fund and the Initiation of this Case as a Claims Contest does not Obscure the Need for Review by this Court.

The origination of the proceedings culminating in this appeal are embodied in a settlement offer filed in the District Court on February 6, 1969. That offer was the end result of many months of negotiation solely between the defendants and the CCS plaintiffs.[1] It was not the result of any negotiation or participation by wholesale and retail druggists and their lawyers. (See Def. Br. 5.)

By the acceptance of that settlement offer, the class litigants, who could only be representatives of the class, according to the District Court, *if* they accepted the settlement, agreed to be bound by the subsequent determinations of the court in accordance with the offer and the applicable law applied to the facts of these cases. The Court's interpretation of its role in these proceedings was announced to Petitioners' co-counsel Edward R. Johnston, and to all the class attorneys, at a hearing on April 29, 1969, prior to the acceptance of the settlement offer by Petitioners and before the Court entered its initial class action order on May 26, 1969. (J.A. 52).

The settlement offer and the proceedings which followed provided the framework for a contest over a presumably unallocated global fund to be contested for by the competing claimants.

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1. Def. Br. 5 is misleading because it refers to negotiations between plaintiffs representatives and defendants prior to February 6, 1969, implying that all plaintiffs had their interests represented. The committee of counsel for all wholesale and retail druggists was not yet in existence.

Petitioners initially chose to remain within the settlement because the Court represented that within its discretion and in the absence of complete agreement, it would allocate to the respective claimants that to which they were entitled in accordance with the facts and the law.

The duty owed by the Court to the litigants in class actions requires fair, adequate and impartial judicial proceedings. Early in the present proceedings following the settlement offer the Court assured all class litigants that it would determine "controversial and controverted issues," that it would "determine what weight and value to give to [consumers] claims," after observing that if the dollar amount to be allocated is not agreeable to *all* claimants, "it will be allocated by the court." (W. Va. No. 44, Trans. 4/29/69 hearing, p. 38).

When petitioners appeared at the first hearing on the settlement prior to the May 26, 1969 class action order and objected to the judicial formation of a consumer class, the court stated the creation of the class is made necessary by defendants' offer and is causing no hurt because "you can say . . . that they have such poor standing as a matter of law that the allocation to them ought to be zero or one percent nominal damages or something of that sort." (W. Va. No. 44, Trans. 4/29/69 hearing, p. 240).

It is fundamental to due process of law, and axiomatic from all case law, that any court exercising its judicial *discretion* must follow the law. This is particularly important in class action litigation where absent class members are affected, and doubly important when plaintiffs' classes are competing for the same fund. No doubt, with this duty in mind from the very inception of these pro-

ceedings, the District Court agreed with that premise because it stated that the Court would make a determination absent complete agreement by all class representatives, and then that Court made the same people to whom it said this the class representatives.

For the same Court which established this ground rule in the settlement competition, to then approve and circulate a consumer notice without the wholesaler-retailer class being present or afforded the right to be heard, to then invite claims, and later ignore those claims by giving "assigned" funds, or "unclaimed" moneys to consumers without ever weighing the relative rights and the likelihood of success of consumers as a class on any statistical or other basis, much less on the dollar amount of claims filed, is serious reversible error.

This is and always was a contest over class claimants allocation. The defendants' offer itself contemplated court approval of any final allocation, and the settlement offer permitted the court (as is its inherent power and duty under F. R. 23 (e)) to make suggestions upon "disapproval of the proposed settlement." (J. A. 74). The Court did not have to accept defendants' plan merely because all the governmental bodies agreed to it and since the wholesaler-retailer class allegedly could not get out of the settlement. The Court had a duty to protect all classes, and its duty to the wholesaler-retailer class, in part, consisted of weighing the rights of states, counties and cities, and consumers who filed claims and those who did nothing.

The Court simply failed to even commence to perform this duty—by ignoring all problems of the *power* of states, etc. to be in court for consumers in the first place, and the right and power to keep the unclaimed funds of

consumers, or any existence of unclaimed funds in a claims contest.

The *multiclass* aspect of these cases is misrepresented to this Court. The competition created by the settlement offer, effectively consolidating all cases around that offer, does not permit isolation of one class's recovery by measuring factors as to that class alone without weighing the likelihood of success for other competing classes. The assertions that the wholesaler-retailer class "have no cause for complaint, that the defendants also chose to make payments for the benefit of injured consumers" (Ala. Br. 13) and that "one class cannot reach into the other classes allocations" (N.Y. Br. 7-8) deny the very scheme of this settlement. Because the District Court itself adopted this unique change suggested by CCS counsel *after* notice to the classes and *after* individual consumer claims were filed in limited number and amount, the wholesaler-retailer class was divested of its vested property rights in and to an *unallocated* part of the settlement in competition with states and consumers. Petitioners' class was illegally and unconstitutionally misled into this settlement contest once the District Court radically altered the scheme of the settlement after class notices were mailed and published.

Respondents either fail to conceive or prefer to ignore the multiclasses competing for portions of a fixed fund. This settlement is unique, and the proponents of this "global" contest, setting plaintiffs against plaintiffs with the defendants as stakeholder, have cited no precedent to support "settlement" principles applied to a *controversy* among classes of claimants. This misconception results in a general discussion of the fairness of the $100 million, but the question of overall adequacy has

nothing to do with the allocation issue and should not obscure the allocation among classes of claimants deliberately left to the Court under the settlement offer and which the Court said it would *determine* absent total agreement.

The District Court's statements that it would make a "judicial determination" when the controverted issues were presented to it by adverse plaintiffs were consistent with its duty to absent class members under Rule 23 (e). Parties acted on such statements in accepting the overall settlement, in filing individual claims for damage and in not filing independent plans of allocation, separate from the $40 million plan of the wholesaler-retailer Committee.

The Court simply failed and refused to exercise that judicial function. Rather, it delegated to CCS plaintiffs, the wholesaler-retailer committee and defendants the discretion vested in it by saying that this is an agreement and all I have to do is stamp my approval on the overall settlement and *any* allocation thereof the defendants select. The fact that the Court made the same allocation to the consumer class as was predetermined by the CCS attorneys on February 6, 1969, namely $37,000,000, even though the consumer class only filed claims for $16,500,000, bears this out conclusively.

Petitioners do not and need not assert that the Court needed to conduct a full-scale hearing as in a trial on the merits. But, the Court had a unwaivering duty to apply the existing law to the facts before it; and if the Court chose to make a *finding* of non-injury to wholesale and retail druggists who were claimants, it had to have a hearing to support such a judicial finding (entirely inconsistent itself with the settlement thesis of

respondents). Then the Court should have determined the facts and law of consumer claimants' recovery and, more particularly, of consumer class recovery of funds unclaimed by individual consumers but claimed by individual wholesaler-retailer claimants with purchase claims of over $345 million, and other special damages. The Court permitted submission of evidence on affidavits alone, over objection of individual retailer claimants and relaxed all proceedings to conform to its concept of settlement, but then as in a litigated hearing made a finding of fact of non-injury to the wholesaler-retailer class by the use of *one* affidavit, contradicted on the face of the record, referring to a uniform percentage markup of 66⅔% over cost. (J. A. 221). Finally, the Court applied the pass-on defense to the class's claims, repudiating the increased cost of doing business as a measure of damage. (As a corollary, the Court necessarily found the fact of direct injury to individual consumers and consumers as a class —again without any proper supporting evidence.)

The inconsistency of this finding and its persistent use by the court and litigants against one class—and the coincidental absence of all discussion of the likelihood of success of CCS plaintiffs and consumers—is conclusive of the advocacy of the District Court against one class—alone. (That finding is derived from the District Court's opinion, App. I, but there never were specific findings of fact rendered in that opinion and the final orders entered thereafter.)

The essential judicial function weighing each of three class's prospective recovery against the others, and applying the law and facts to fixed fund, was not performed. Nowhere, and not even by the slightest degree of intimation, have the lower courts and respondents dealt with

a) tne standing of consumers, b) the legality of CCS recovery of unclaimed funds allocated by defendants according to prearranged negotiations with CCS, c) discussed *other* measures of damage to the wholesaler-retailer class in addition to overcharges, and d) measured the prospects for success of CCS plaintiffs in view of clear evidence of the criminal proceedings that there was no evidence of an underlying conspiracy to fix prices in that market (a point which should automatically militate against that class getting 100% of its alleged damage at the expense of another class receiving 2 to 3%).

Equally, nowhere do the lower courts or respondents discuss the vast individual purchase claims of the wholesaler-retailer class, filed under oath and aggregating $345 million, in light of the result of 100+% to CCS, 100% to individual consumers, and 2-3% to wholesalers and retailers, while at the same time leaving some $25 million of *unclaimed* or *assigned* or *gift* funds to inure to CCS plaintiffs anl their special counsel because they are Rule 23 class representatives.

Nowhere do the lower courts consider the conflict of a Rule 23 representative involved in a competition with the same class it represents for the same fund. The CCS group and the consumers are competing, and the Rule 23 representatives, the CCS, have arbitrarily determined in advance the amount to be given to the class they purported to represent, and then are retaining the surplus of that predetermined allocation above the claims filed.

All respondents somehow believe that in class litigation the named parties by agreement or acquiescence can accomplish a legal result which the Court could not perform under all law, and then the Court can accede to the representatives wishes by deferring to their suggestions.

It is most basic that all plaintiffs are in court, and all entitled to all the protection and disabilities of court proceedings and the protection of due process of law. Simply put, there is no independent concept of settlement exclusive of the law that operates outside of and in derogation of it. The discretion of the court discussed by respondents in varied and contradictory terms embodies all concepts of law addressed by petitioners and which most respondents choose to ignore. Constitutional rights cannot be denied and trampled on in the name of any principle of judicial *discretion*, and the conduct of these proceedings constitutes a gross abuse of discretion flagrantly contrary to Section 4 of the Clayton Act, Rule 23 and in violation of due process of law. The Petition should be granted so this Court can so hold.

II.

The Results Accomplished by the CCS Recovery of Unclaimed Consumer Funds for the Benefit of all Citizens of States, etc. is the Same Parens Patriae Concept Currently on Review in this Court in Hawaii v. Standard Oil Co.

The defendants offer of settlement placed all plaintiffs in two categories—(A) claims of states, cities, etc. and (B) claims of wholesalers, retailers, and individual consumers, etc. In the absence of an agreed plan of allocation by plaintiffs, defendants could elect to proceed with any proposed plan or modification, and if the allocation to any government entity plaintiff under a Plan elected by defendants should be less than that under a Plan proposed by that plaintiff, then that plaintiff might "withdraw from the settlement." (J.A. 73-74).

The District Court treated the wholesaler-retailer class as locked into the settlement, stating it alone had no

right to withdraw and that to give that class more money necessarily decreased CCS recovery and would most certainly have destroyed the settlement. CCS proprietary recovery and CCS consumer recovery are treated as the same.

All CCS plaintiffs assert, along with the lower courts, that the money is for them, and for citizens at the same time. The combination of CCS—consumer monies into one fund without requirement for claims against the balance, leaves these funds to the states, etc. to either a) seek more individual claims, or b) propose a plan to the District Court which in turn can then (1) use the money for a specific project, or (2) go into the general revenue fund of the state directly or by escheat or, as in the case of the State of New York, via that State's Abandoned Property Law.

Defendants state as to the unclaimed money that:

> "The share of the settlement fund which was allocated to consumers is for individual consumers and not for the states, as an allocation on account of *parens patriae* claims would have been." (Def. Br. 9).

Such an assertion by the offerors of this settlement is immediately contradicted, refuted and impaired by:

1. The District Court effecting a *combination* of CCS allocation and "unclaimed" consumer funds when it stated in its opinion that: . . . "If the allocation to any government entity plaintiff under a Plan elected by defendants should be less than that under a Plan proposed by that plaintiff, then that plaintiff might 'withdraw from the settlement.' . . . An increase in any allocation to the wholesaler-retailer class would have resulted in a decrease by that amount in the allocation to government entity plaintiffs." (Pet. App. I, p. 40).

2. South Carolina asserting:

> "The Plaintiffs were comprised of two classes, a CCS class (cities, counties and states representing

themselves and all consumers within their jurisdiction) and a wholesaler-retailer class, representing druggists throughout the United States." (S.C. Br., p. 2).

3. The State of Alabama, etc. saying:

". . . petitioners have no grounds for complaining that the courts below allowed CCS entities to recover as trustees on behalf of those consumers who filed no claims. . . ." (Ala, Br., p. 13) and

4. Finally , the Court of Appeals stating:

"The notice stated that those not filing individual claims by a certain date would be assumed to be authorizing that state through its Attorney General to recover on their behalf. . . . To require those who wish to authorize the state to recover for them to affirmatively notify the Court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum."[2] (Pet. App. II at 23).

It therefore follows that all CCS recovery of unclaimed consumer funds is initially and ultimately founded upon a *parens patriae* concept as defined by the defendants themselves in their Responsive Brief, when they made the offer based on CCS *parens patriae* complaints and accords with what CCS plaintiffs then espoused. The unclaimed funds are for the states for their own separate use without restrictions, save approval of the District Court of any plan to use the money for the benefit of *all citizens* alike—the very same benefit that a state would derive from any recovery of damages for injury to its economy. The money goes to the same citizens. Whichever of the mutually contradictory theories is the basis

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2. Failure of the District Court to afford the wholesaler-retailer class an opportunity to be heard on this notice has been attacked as a violation of due process of law since all rights of CCS plaintiffs to unclaimed consumer funds, since they purport abandonment of the *parens patriae* concept, are derived from that notice.

for CCS recovery of these funds—be it an assignment, an escheat of unclaimed money, a trust fund—the consequence is the same. The money goes to the city, county and state treasuries or to the Attorney General for all citizens alike, and is in no way limited to purchasers of broad spectrum antibiotics—over 60 million people.

Further confirmation of the importance of the *parens patriae* concept to accomplish CCS recovery of unallocated consumer funds, unclaimed or assigned, is found in CCS complaints, most of which were amended after the offer to accord with it, seeking recovery on that basis alone in the prayers of their complaints, and in the wording of the settlement offer covering "claims of . . . individual consumers arising out of their purchases, including claims of states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state." (Pet. App. I at 23).

In the "litigated" antibiotic cases (S.D. N.Y., M 19-93A) Judge Miles Lord, in distinguishing between the state acting as a Rule 23 representative and as *parens patriae*, attributes the latter concept to where "all such [unclaimed] amounts be given to the state for administration for the benefit of absent citizens," and observes that "Rule 23 does not require that the class representative be so rewarded." (Pet. for Cert. 50)

It is essential to jurisprudence and to basic justice that legal concepts maintain a certain meaning and integrity in our courts.

The rights of competing classes to examine and rely upon CCS plaintiffs' complaints and the theories they asserted for their as yet unallocated share is fundamental to orderly and constitutional procedures in class litigation. It is the facts at the time of notice which determine rights—and those facts cannot be changed after notice to any class. The change in CCS theories of recovery to an assignment by silence from a notice upon which

petitioners' class was not heard is so radical a departure from the scheme of this settlement, embodied in part by the court's assurances to all representative parties, that all actions subsequent to the class notice are vitiated unless the proceedings are restored to their initial intendment.

Predetermination of Allocation

Essential to any scrutiny of the issue of abuse of discretion in this Reply is the occurrence of a predetermination of the allocation to each of the respective classes prior to the initial offer, on its face presumably unallocated on February 6, 1969.

While the respondents claim lack of predetermination, the record is clear that CCS attorneys and defendants alone **negotiated** the settlement and that the allocation of $97 million to CCS plaintiffs which included $37 million for consumers "is the way the settlement was actually negotiated" (J. A. 199, aff'd. of David I. Shapiro). The word "negotiated" implies knowledge on the part of the other party to negotiations, namely, the defendants.

Further, the affidavit of Lee Freeman in talking of the details of negotiations by him and three other CCS plaintiffs solely for their class, states: "although plaintiffs stated and defendants recognized that tentative acceptance by state and local bodies could not be achieved without a close approximation of the allocations, defendant insisted that they could not be committed to any allocation plan in advance." (J.A. 216)

The same CCS attorneys and defendants then agreed that if the plaintiffs in all classes did not agree on an allocation plan, the defendants could select a plan of allocation. Of course the defendants selected the very CCS plan used in February 1969, to secure tentative approval from all public parties—those who, if they failed to receive their predetermined allocation had the

sole right to "opt out" of the settlement. At the same time the wholesaler-retailer class had no knowledge of this predetermination and was invited to file claims and to compete againt an *unallocated* global offer. Confirmation of this predetermination screams from the record and need only be verified by a reading of the CCS counsel, Shapiro and Freeman affidavits (J.A. 178, 207, 232). It is therefore immaterial that the defendants continued to assert lack of predetermination when they knew that the CCS plaintiffs negotiated the entire settlement and its allocation while parenthetically inserting the wholesaler-retailer class, who were not present, for the sum of $3 million. The defendants are charged with knowledge of this predetermination.

The constant assertion by all the respondents that the defendants had a right to select the Plan offered by any of the plaintiffs, or to modify said plans, was in anticipation of any possible difficulty with plaintiffs other than the CCS class with whom the defendants had negotiated the settlement. It is obvious that the arrangement which gave the final "say" to the defendants was deliberately designed to preserve the predetermined allocations of the CCS attorneys, who solely negotiated the settlement with the defendants. Even in their arguments here, respondents assert that all of the parties who *negotiated* the settlement for themselves "believed that the druggists were entitled to nothing." (Ala. Br. 6). Their assertion to this Court of an open, and not pre-arranged offer is an imposition on the Court, further aggravated by the letter of August 2, 1971, from CCS attorney, David I. Shapiro, purporting to amend or correct the previous declaration concerning this subject and again asserting lack of knowledge on the part of the defendants.

The District Court knew of this predetermination from these affidavits and the protestations of petitioners and others, before it held the allocation hearing. By refusing to make an *in depth* judicial determination, and by stamping its approval on the plan selected by defendants and ignoring the Committee's $40 million plan, stipulated by the parties to be before the Court, and by its failure to consider and weigh claims filed, the Court's judicial hearing amounted to a hoax—at least insofar as the preservation of any rights by petitioners' class are concerned. Respondents persistent claims to an unallocated offer, coupled with references to negotiations between Plaintiff and defendants prior to February 6, 1969 without specifying which plaintiffs negotiated constitutes an imposition on this Court, by itself requiring the granting of certiorari. This predetermination negatives the judicial propriety of the alleged "hearing" conducted on March 24, 25, etc., 1970. These were not hearings with evidence, but merely perfunctory acceptance of affidavits and arguments of counsel to stamp the defendants modified plan (and the Alab. Plan) with judicial approval. The Court ignored all objections to that plan (contrary to *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir. 1942)); erroneously conceived of its function under Rule 23(e) forgetting its earlier statements that it would make an allocation determination in the absence of complete agreement, and disregarded a provision in the settlement offer giving the Court the right to make *suggestions* to the parties if it denied approval of any plan[3] (J.A. 74).

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3. At a Dec. 15, 1969 hearing on Notice to the classes of the allocation hearing, Harold Kohn, a leading CCS attorney, stated that the money was on the table and everybody would take his chance "that your Honor would distribute the money fairly and in reasonable accordance

Without belaboring a point termed vague by the Court of Appeals, serious charges of conflicts of interest and legal impairment by class attorneys were directed to the District Court which twice refused to conduct any hearing into these matters. To convey to this court the details and serious nature of these matters petitioners are requesting the Court of Appeals to convey a "Cross-Petition" for reformation of the Committee of Counsel to this Court.

The allegations of the Cross-Petition for removal are far from vague, and primarily reflect matters apparent from the face of the record. To say that negotiations between former co-counsel, participation in negotiations by a counsel for two competing classes, and negotiation by a class counsel already prohibited from representing part of the class, are insufficient to compel a Rule 23 hearing when "good faith" and "arm's length negotiations" are the essence of the District Court's opinion denies any significant meaning to a court's determination of class representatives and their counsel. Without a hearing the Court could not properly discount these serious matters. The record shows the careful unwillingness of the Court to become immersed in these serious but necessary questions prior to the time it was supposed to make its judicial determination of the allocations to each class. The record further reveals no basis for the as-

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with the laws and what people might be expected to get in proportion to each other had they separately litigated this matter." (CCS App. 50)

sertion of "intensive" negotiations between these same conflicting plaintiffs' counsel. (Ala. Br. 7).

These facts present an exquisite case for exercise of this Court's important supervisory powers.

Precedential Import of This Case

Any examination of this case in terms of abuse of discretion, aside from taking into account principles of due process and the legal peculiarities and disabilities of the representative parties, cannot ignore the effect of the result achieved on substantive principles of law. There can be no dispute that the law applied by the lower courts amounts to a repudiation of the increased cost of doing business as a measure of damages under Section 4 of the Clayton Act. Enlargement of the "cost plus" exception declared in *dicta in Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481 (1968) is the immediate result of approval of this settlement.

Respondents persist in refusing to discuss the substantive law underlying the results achieved by the settlement allocation. The maxim that the court need not decide disputed issues of law and fact, aside from its irrelevancy to the multiclass contest created here, does not excuse **any** discussion of the application of those principles of law and of questions of fact to the case at hand. Petitioners submit that only by a non-discussion of consumer standing after purchases of price-fixed products from retailers in an independent competitive market can there be somewhat obscured from vision the absence of affirmative principles of law to support any award to consumers and then to their class representatives. Ala. Br. 12, fn. 10, cites cases for rights of consumers to sue—of course all of those cases involve the standing of cities

and states as purchasers and the fact of direct injury after trial on the merits, and none involve a broad consumer class removed once or twice from the price-fixing manufacturers by wholesale and retailer markets. Citation of *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, for the standing of remote consumers removed from price-fixers by free and independent markets constitutes another unwarranted imposition on this Court.

Again, in respondents discussions of the theory of consumer recovery, the same confusion pervades. First, the District Court discusses *no theory;* then, the Court of Appeals confirms an "assignment by silence," a theory not even advanced by CCS plaintiffs in that Court and repudiated by CCS counsel, Mr. Shapiro in the District Court when he denied its very existence. (CCS App. 54).

The concept of assignment by silence approved by the Court of Appeals has no basis in law and results in the taking of property without due process of law in this case. The vested rights of wholesalers, retailers and consumers to the settlement fund created by defendants' offer and deposit are not subject to divestiture for either public or private use without compensation. In *Chicago, Burlington R'd.* v. *Chicago,* 166 U.S. 226, 239 (1897) this Court deemed compensation for private property taken for public use an essential element in the due process of law. The Fifth and Fourteenth Amendments guarantee such rights will not be taken without due process of law.

Any rights of petitioners' class to the settlement fund in the control of the District Court, and any rights of individual consumers to that fund cannot be divested without compensation. Yet, the assignment by silence theory accomplishes that precise result. Making silence the operative fact for the loss of property rights has no

place in this case, or in a court of law. (Pet. for Cert. p. 58—remains unanswered). The approval of the so-called "Book-of-the-Month-Club" procedure compels immediate consideration, and repudiation, by this Court.

If disputed and sharply contested substantive principles of law and fact are unnecessary of decision (Com. Br. 3), the lower courts grievously erred in its discussion of assignment of unclaimed funds and pass-on, and in holding that the wholesaler-retailer class had a uniform mark-up, was not injured, and then applying the pass-on exception as the controlling rule of law, and lastly, in placing consumers within the scope of those persons directly injured with standing to sue under Section 4 of the Clayton Act.

The precedential import of this case is no more in evidence than in the *Ampicillin Antitrust Litigation* in the United States District Court for the District of Columbia, where CCS attorney Lee A. Freeman, a leading CCS counsel, cites *Illinois* v. *Chas. Pfizer,* 68 Civ. 273 (S.D. N.Y. 1968) and *West Virginia* v. *Pfizer,* 314 F. Supp. 710, 724 (S.D. N.Y. 1970) in his "Memorandum In Opposition To The Applications For Leave To Intervene" for the proposition that

> "Judge Wyatt held that the State of Illinois could maintain a class action as the proper representative of the consumers who resided within its territorial limits." (at page 6).

After stating in the same Memorandum, at page 9, that:

> "While the decisions in the *tetracycline antitrust litigation* were made in a settlement context, the rationale of those determinations accords with all relevant federal law, and applies with undiminished force to these consolidated proceedings,"

he goes on to assert that Judge Wyatt ". . . described this aspect of how retailers and wholesalers operate in the drug field. These observations apply with equal force to the present case:" (at page 12, citing part of Opinion—see Pet. App. I, p. 79-80).

Of course CCS plaintiffs intend to *and are in fact* using this case as precedent in the district courts and elsewhere to eradicate the holding in *Hanover Shoe*; and to place themselves in the position of being the beneficiaries of recovery of consumers' alleged tort claims under the anti-trust laws *when and if* they so choose. This consequence fails to comport with the broad scheme of both civil and criminal antitrust law enforcement under existing statutes.

Several most recent cases further delineate the error and serious legal consequence of the holdings herein.

In *City of Philadelphia* v. *Am. Oil Co., et al.,* Civil Action No. 647-68 (D.C.N.J.) an order was entered on July 13, 1971, in antitrust suits by motorists who purchased from retail gas stations, against major oil companies for fixing gasoline prices for 1955 to 1965 denying a consumer class. Nothwithstanding recognition of retention by defendants of ill-gotten gains from their assumed conspiracy by failure to certify a class of all ultimate users, the court refused to create that class (as opposed to one of public governments and purchasers in tank wagon quantities) stating:

> It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to the rightful recipients, the class is unmanageable. (p. 46)

To be sure, claimants who have filed claims in the present case, whether they are consumers or wholesalers, or retailers, are a definable quantity, but to invite more

claims by the re-opening of claim dates for one of the classes invites the *impossible* management task and offends due process by unequal treatment for one class to the detriment of another.

The same non-availability of records inherent in denial of a class of all motorists manifests reasons for the denial of a consumer class of purchasers of broad spectrum antibiotics (even assuming the consumer *knows* he bought these products). The paucity of consumer claims underscores the lack of intended remedy, *ergo* the lack of standing afforded consumers. If this case proves anything about individual consumer recovery, it is the inherent impossibility of that recovery on any individual basis even if, as here, the "insurmountable" problem of proof referred to in *Hanover Shoe* are ignored.

In *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D. N.Y. 1971) a class approach to damages of investors from "odd-lot" dealers on the New York Stock Exchange was approved. That class recovery approach *was not* initiated in this case. It was not the scheme of this settlement and allocation contest that the classes present their respective legal and factual positions exclusive of their respective *claims* position. Quite to the contrary, the specific repudiation of *parens patriae* recovery by CCS plaintiffs coincided with the filing of plans of allocation by competing classes after the filing of individual purchase claims invited by Rule 23 notices.

The existence of this case as a claims contest is further confirmed by the proposed plans of allocation relying on claims filed, and not on total *assumed* consumer damage on a statistical basis. The arbitrary predetermined allocation to a consumer class of $37 million not only bears no relationship to claims, but cannot be rationally related

to any *assumed* total consumer treble damage on a class statistical approach, which would come to over three billion dollars.

A new body of law created especially and exclusively for governmental plaintiffs, without any new legislation, is adopted in the lower courts; and this is acomplished without any traditional safeguards carefully evolving in class litigation and in sharp contravention of the rights of other litigants and classes.

The merits of this settlement can be weighed not only against the impact resulting but also from the defendants' persistent and vigorous contention in the "litigated" antibiotic cases that as a matter of law consumers have no right to sue under Section 4 or under Rule 23, nor can states recover for them as *parens patriae,* but that right belongs exclusively to first purchasers. We know of no legitimate reason why defendants should create a consumer recovery by their conduct (the offer according to the District Court required a consumer class) in one part of a total complex of cases and then deny the rights of that class, and individual consumer claimants, in the contested part of the same litigation. If a consumer class has no viable legal existence in antitrust litigation where consumers are removed from the price-fixers by markets where independent pricing decisions are made, defendants by their offer cannot create such a class and thereby vest it with non-existing rights. So long as Court approval is sought and needed under Rule 23 (e) for a binding *res judicata* effect, class litigants are powerless to create a settlement contrary to existing substantive law. The total illegality of the settlement allocation denominates it as a clear abuse of judicial discretion.

III.

The Cumulative Effect of Respondents' Misstatements and Contradictory Descriptions of What Transpired in the District Court and of the Issue on Appeal Constitutes an Imposition on this Court Compelling Review.

The unclaimed consumer funds allocated by predetermination between CCS plaintiffs and defendants need not go to CCS plaintiffs. The sole right to opt out was given to CCS plaintiffs under ¶ I. A. of the settlement offer if those plaintiffs did not get as much as their own proposed plan of allocation. (J.A. 71, 73 ¶ E (1)). Since CCS retention was not written into the offer, the CCS plaintiffs cannot torpedo the settlement merely because they do not obtain consumer funds.

All respondents further ignore a comparison between the existing settlement allocation and the separate settlement to private hospitals and Blue Cross Insurance Companies. Private hospitals having total purchases of roughly $200 million are receiving over $22 million in settlement, while wholesaler-retailers with five times as much in purchases, or roughly $1 billion, are receiving $11-12 million. The hospital comparison is avoided, petitioners submit, because on its face it indicates an abuse of discretion to petitioners' class. (The wholesaler-retailer class was to receive $3 million plus the interest on $85 million for 13 months following the deposit of these funds, but since no final order was entered within the 13 months, due to petitioners' appeal, an additional month's interest on the total deposit accrued to the benefit of petitioners' class, which sum for the one month is about $650,000.)

All respondents pose the spectre of this settlement falling apart if a reversal is ordered by this Court. Such a result need not and probably will not follow. The De-

fendants have parted with the settlement fund and achieved the tax benefit of a write-off intended by that payment. The settlement offer itself conceives of Court suggestions upon any disapproval, and all parties indicated in the District Court the expectancy of a Court allocation absent total approval of the allocation.

The escrow deposit leaves the settlement fund for use in future settlements and to satisfy judgments against defendants in these cases. (J.A. 160, *et seq.*)

Respondents assert that petitioners seek consumer funds thereby attempting to obscure their own sacrosanct allocation in view of the entire criminal record revealing that defendants' price fixing was directed at the wholesaler-retailer, consumer market, and not the CCS market at all. The only explanation for the CCS priority is the District Court's approval of it because the priority was built into the Alabama Plan. Any analysis of the likelihood of success of the CCS class with its problems on the liability issue would necessarily reduce CCS recovery to the benefit of the wholesaler-retailer class.

All of the respondents failed to mention the dollar amount of claims filed and the relationship of purchase claims to the recovery under the allocation plan approved. This failure emanates from the disparity of the respective classes recovery—CCS plaintiffs and consumers obtained over 100% of their class damages and a windfall of $23-25 million not claimed while the wholesaler-retailer class claimants get 2 to 3% of their theoretical overcharges (including their special damages). The entire record below reveals the District Court's advocacy against the wholesaler-retailer class; for example, that Court ignored all evidence of various measures of damage to retailers, exclusive of overcharges when it approved a nuisance allocation.

Further misrepresentations pervading respondents' briefs are discussed separately below, but the cumulative effect of all the misleading comments cannot be underemphasized.

The ability of the CCS plaintiffs to accomplish this settlement through the subversion of the wholesaler-retailer class and the creation of consumer class recovery, and then CCS recovery of unclaimed, but allocated consumer funds, led to charges of conflict of interest, legal disabilities and the suggestion of collusion—into which the district court *refused* to conduct any hearing. The Alabama brief at p. 15 says "the court gave them [petitioners] every opportunity to ventilate and or place their charges fully." This is untrue; no hearing was held on representation although requested by petitioners *and others* —and was required under Rule 23 to protect absent class members. The lack of a hearing was more reprehensible since the court chose to rely on the absence of any conflicts of interest, etc. 'in leaning heavily on the wholesaler-retailer classes' attorneys' acceptance of the allocation "in good faith" and after "arm's length negotiation" with the same people with whom they were interlocked.

The respondents suggest to this Court that the Petitioners seek something which belongs to states and consumers. That is not so. All petitioners seek is merely a proper allocation for their class which accords with the facts of this case, demonstrated above to be a contest over the allocation to each class of what was represented to be an unallocated fund within the control of the District Court. This cannot be and never was addressed solely to how much any single class should obtain. (Ala. Br. 2)

It is not merely petitioners who dissented in the District Court (Ala. Br. 3). Objectors include the firm of

Peck, Shaffer & Williams on the committee of counsel, before they withdrew their legal objections to the defendants' modified plan, and other attorneys representing claimants with total purchase claims of over $75 million. The fact that only petitioners appeal should not be construed as a denial of support from other members of the class. The real question is why, in view of this appeal, does the committee of counsel which can only benefit from a successful appeal here, oppose this petition for certiorari.

There is no requirement that the CCS plaintiffs reopen the claim dates for consumer claims. The mere assertion by some states that that is what they intend does not mean that claims will in fact be invited, nor can anyone foretell how many claimants will file purchase claims in 1971-72 for purchases in 1954-1966. The question of few new claims is verified by the existence of only 40,000 claims from over 60 million prospective claimants after a massive claims program in the District Court in the summer of 1969. The impossibility of a further claims procedure, aside from its due process problems is reviewed in *City of Philadelphia* v. *American Oil Co., supra,* discussed above at page 21.

Petitioners do not say that no one who supports a settlement can be the class representative. Petitioners do assert that the class representatives should not be so designated merely and solely because they support a particular settlement. The representatives should be chosen independently of the settlement and not because of it.

Respondents suggest that petitioners seek to have the court "transfer" funds allocated to consumers from them to the wholesaler—retailer class and further state that

is impossible (Ala. Br. 15). Petitioners do not seek the "transfer" suggested but request of this Court a reversal of the allocations with directions to the District Court and to the parties to readjust the allocations, by making "*suggestions*" as contemplated upon court disapproval of the proposed allocations, so that new allocations protecting absent class members and compensating each litigant in each class in accordance with the facts and the law can be ultimately accomplished. It is within the equitable power of this Court, as it was within the province of the courts below, to require of the litigants that the allocations ultimately accomplished in these class actions be consistent with all the applicable law and the facts presented.

CONCLUSION

Respondents fail to comprehend the true nature of a petition for writ of certiorari, which does not primarily concern itself with error. In this reply since they deal with the question of error and abuse of discretion, we have replied partially in kind, without attempting to indicate to the Court that this is the basis for the granting of certiorari.

Respondents' refusal to directly answer the reasons for the granting of certiorari is a deliberate attempt to obscure the issues of law approved by the lower courts and the impact that this case will have on pending multi-class antitrust litigation. The importance of the issues raised in the petition herein remain unanswered and undiminished.

A reading of the two lower court opinions reveals them to be a manifest of error and abuse of discretion. For the

reasons stated in the petition and in this reply, this Court should grant certiorari and resolve the important issues presented herein.

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